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ABSTRACT

This document examines some of the questions concerning copyright law and the educational use of equipment that can easily duplicate, store, and transmit instructional materials. It is argued that a delicate balance must be achieved between protection for copyright holders and access for educational purposes to audiovisual works, music, computer technologies, and printed works. The discussion includes the following topics: (1) contract law; (2) videotaping, video rental, and closed-circuit television; (3) library reproduction; (4) computer software, database downloading, and telefacsimile (FAX); (5) licensing agreements; and (6) copyright policy development. Several illustrations of fair use of copyrighted materials are provided, as well as guidelines for classroom photocopying, software use, use of music, and recording broadcast programming for educational purposes. (DB)

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A Guide to Fair Use and Permissions Procedures

by R. S. Talab

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Second Edition

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Copyright and Instructional Technologies

A Guide to Fair Use and Permissions Procedures

by R. S. Talab

Second Edition

Association for Educational Communications and Technology

Washington, D.C.

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FOREWORD TO SECOND EDITION

The following contributors are to be thanked: Charles Vlcek, Sandra Wertz, Gary Becker, Terry Holcomb, Beda Johnson, and Lyn Kaiser for their contributions. Special "thank yous" to Charles Vlcek for his invaluable help in reading the manuscript and to Jerome Miller for editing it to a successful conclusion. Lastly, Stan Zenor, Executive Director of AECT, is to be thanked for his suggestion that this second edition be written.

R.S. Talab
Chair, Copyright Committee

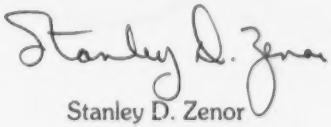
Copyright law is subject to judicial interpretation and legislative revision. The material presented here attempts to consolidate legal opinion as a predictive guide. As such, it reflects a conservative approach and endeavors to direct teachers and media professionals toward most reasonable and practical uses. It is not a substitute for legal advice.

PREFACE

Copyright has been and continues to be a topic of discussion and concern within education and our field. As with any legislation, there are wide and varied interpretations of the intent and meanings of the copyright law. It must be remembered, however, that the only definitive interpretation of the intent and meaning of the copyright law will be developed through judicial interpretation.

Although often difficult and frustrating to work with, the importance of the copyright law and compliance with the law cannot be understated. The copyright law protects the interests of the copyright holder. It also protects the interests of the users of copyrighted materials. Without protection of the interests of the copyright holders, there is no protection for the users of copyrighted materials.

The material in this document is drawn from the actual copyright law, court cases, and from noted copyright experts throughout the country. This document reflects a conservative and practical approach in looking at the intent and meaning of the copyright law. It is intended to assist media and technology professionals and all educators in developing a clear understanding of the law and in developing policies and guidelines for compliance with the law. This document is not a substitute for legal advice. In areas of unique or unusual interpretation of the copyright law, individuals are best served by advice from legal counsel.



Stanley D. Zenor
Executive Director

COPYRIGHT LAW

In recent years new and innovative ways of learning have "mushroomed"—interactive systems, optical media, satellite, and a plethora of evolving technologies. Equipment that can readily and easily duplicate, store, and transmit instructional materials anywhere in the world is available in many educational institutions. But because it is constantly evolving, this technology still poses many questions concerning its use. One of the most perplexing questions is how to preserve a delicate balance—giving educators and students the greatest possible access to instructional materials while still protecting the rights of copyright proprietors. This *Guide* is an attempt to provide some answers to that question.

Article I, Section 8 of the U.S. Constitution grants Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." To implement this Constitutional provision, the U.S. Congress has passed a series of copyright laws, beginning with the 1909 Copyright Act and its most recent update in 1978. These laws provide important protection to authors, creators, producers, and publishers by allowing them to control the publication of their works and to obtain economic profits from their distribution.

Copyright serves a dual purpose: encouraging the *development* of new and original works and stimulating their wide *distribution*. The copyright law (P.L. 94-553) has codified a 100-year-old concept into law—established over a period of years by the courts—called *fair use*. This principle sets certain limitations on the exclusive rights of producers and allows some reproduction and use of copyrighted materials without the copyright proprietor's permission and without the payment of a fee. If the limits of fair use are exceeded, permission of the copyright owner must be sought to reproduce his or her materials.

Rights of the Copyright Owner

There are five separate and exclusive rights which are granted to the copyright owner, each of which may be transferred separately or jointly:

1. The right to reproduce the work
2. The right to prepare derivative works (make another version)
3. The right to public distribution of the work
4. The right to publicly perform the work, if literary, musical, dramatic, choreographic, motion picture, or other audiovisual work. "Publicly" means outside of a place where a family or a small social group is gathered. The copyright owner's right under this clause applies to nonclassroom performances in schools.

5. The right to publicly display the work, such as photographs, motion picture "stills," audiovisual computer screen displays, etc.

FAIR USE (SECTION 107)

Public Law 94-553, effective January 1, 1978, specifically addressed the principle of "fair use" in Section 107. Reproduction of copyrighted materials is permitted for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. In determining whether the use of a work in a particular case is fair use, four criteria must be met.

These four criteria provide only general standards, however, and each situation must be decided on the basis of its own facts. In addition, there are three tests—spontaneity, brevity, and cumulative effect. These are discussed in greater detail within the four criteria. The four criteria and the three tests are designed as "checkpoints" toward effective decision making. Specific guidelines pertaining to printed materials (including music), computer software, and off-air taping were developed over the last few years by representatives of the educational community, authors, and publishers. These guidelines are included in the appendices. Let us look briefly at each of the four criteria.

1. Purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.

One of the key elements which must be considered is whether or not the use is spontaneous—and at the volition of the teacher rather than at the suggestion of the school administration, either in special instances or as part of a general plan. Congress recognized the professional advisory role played by personnel such as media specialists and the following statement was included in remarks made by Congressman Robert Kastenmeier (chairman of the House Subcommittee on the Courts, Civil Liberties and the Administration of Justice) when the bill was passed: "It has been pointed out that, in planning his or her teaching on a day-to-day basis in a variety of educational situations, an individual will commonly consult with instructional specialists, audiovisual directors, guidance counselors and the like. As long as the copying meets all of the other criteria laid out in the guidelines, including the requirements of spontaneity and the prohibition against the copying being directed by higher authority, the committee regards the concept of 'teacher' as broad enough to include instructional specialists working in consultation with actual instructors."

Another way of determining the character of the use is to determine whether it is a productive use. To use a part of a work in producing another, such as in scholarship or criticism, is considered productive. "Productive" can also mean

to produce something for the public good, as opposed to commercial purposes. If the legitimate public interest is to be served, and there is a need for this information to be disseminated, then the more likely it will be that fair use protection will be granted.

2. The nature of the copyrighted work.

According to the report issued by the Senate committee when it passed the bill: "The character and purpose of the work will have a lot to do with whether its reproduction for classroom purposes is fair use or infringement. For example, in determining whether a teacher could make one or more copies without permission, a news article from the daily press would be judged differently from a full orchestral score of a musical composition. In general terms it could be expected that the doctrine of fair use would be applied strictly to the classroom reproduction of entire works, such as musical compositions, dramas, and audiovisual works including motion pictures, which by their nature are intended for performance or public exhibition.

"Similarly, where the copyright [sic] work is intended to be 'consumable' in the course of classroom activities—workbooks, exercises, standardized tests, and answer sheets are examples—the privilege of fair use by teachers or pupils would have little if any application. Textbooks and other materials prepared primarily for the school markets would be less susceptible to reproduction for classroom use than materials prepared for general public distribution."

3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole.

Referring again to the Senate report: "In general, and assuming the other necessary factors are present, the copying for classroom purposes of extracts or portions, which are not self contained and which are relatively 'not substantial in length' [brief] when compared to the larger, self-contained work from which they are taken, should be considered fair use...." This should not be construed as permitting a teacher to make multiple copies of the same work on a repetitive basis or for continued use.

Applying this test to audiovisual materials must always be done very carefully. The crucial portion of a sound recording or film may be short in length, but may represent the majority of the dollars and effort invested in the product. This leads directly to the next criterion.

4. The effect of the use upon the potential market for or value of the copyrighted work.

The Senate report explains this criterion very clearly: "This factor must almost always be judged in conjunction with the other three criteria. With certain special

exceptions (use in parodies or as evidence in court proceedings might be examples), a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement. As in any other case, whether this would be the result of reproduction by a teacher for classroom purposes requires an evaluation of the nature and purpose of the use, the type of work involved, and the size and relative importance of the portion taken. Fair use is essentially supplementary by nature, and classroom copying that exceeds the legitimate teaching aims such as filling in missing information or bringing a subject up-to-date would go beyond the proper bounds of fair use. Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented" [cumulative effect].

Another aspect to be considered is the extent to which a copied work can be used as a substitute for a purchased copy. The more it is possible to use a copied work—in whole or in substantial or key part—in place of the original, the less likely fair use applies. Sometimes called the "functional use" or "substitute effect" test, this is another way of estimating economic harm.

CONTRACT LAW

Copyright ownership can be signed away in a contract. It cannot be retrieved. Because of this, it is an important consideration, whether in signing a publishing contract or signing a work-for-hire agreement. A contract between an employee and the institution, in which the employee signs a statement that eliminates district liability for the employee's infringement as well as court costs, attorney fees, and insurance, is also binding.

Because the copyright law was purposefully made to handle new technologies which could not have been imagined by many of those who helped to put the law together in 1976, the decisions of the courts are extremely important. This has been so historically, as well. For this reason, and because new technologies bring about new uses, the interpretation of copyright law literally proceeds with each court case.

The Off-Air Taping Guidelines and the Guidelines for Educational Uses of Music, for example, are agreements which have an impact on how the law is interpreted in court decisions. While they apply only to those groups that negotiate them, they provide guidance to interested users.

AUDIOVISUAL WORKS

Audiovisual works: "consist of a series of related images...shown by the use of...projectors, viewers or electronic equipment, together with accompanying sounds, if any...." They can be filmstrips, slide sets, multimedia kits, videos, motion pictures, or video games.

Off-the-Air Copying of Television Programs

The increasing availability of videotape equipment that can be used to record television programming off-the-air has led more and more schools to use commercial and educational television programs in the classroom. The intent is to record programs off-the-air to be replayed at times more convenient for classroom use. Under Sections 108 and 118 of P.L. 94-553, educational institutions were given the right to record newscasts and certain public broadcasts. This has been made possible through the off-air taping guidelines—"Guidelines for Off-the-Air Recording of Broadcast Programming for Educational Purposes."

Provisions of the Off-Air Taping Guidelines

The period during which a program may be shown is 10 days. During that time a program may be shown once "in the course of relevant teaching activities," and then repeated once only for reinforcement purposes. No definition is provided for what constitutes "the course of relevant teaching activities," whether it includes a class for which a teacher has more than one section or not. However, until the guidelines have been tested and made clearer, it seems reasonable to assume that a teacher who instructs more than one section of a class, such as three sections of English 101, would be in keeping with the guidelines if a tape was shown to those sections, as long as proper use records were kept.

After the initial 10-day period, the instructor has 35 more days in which to review the tape. This 45-day holding period does not include weekends, holidays, vacations, examination periods, or other scheduled interruptions. In effect, the holding period lasts around two months. At the end of that period the tape must be erased or destroyed immediately.

A "limited number" of copies may be made to meet the "legitimate needs" of requesting teachers, but each request must be initiated by the teacher. This does not prevent the media specialist from alerting faculty of programs that might be beneficial. Regardless of the number of times a program is broadcast, it can only be taped once for that teacher.

"Limited number" is a vague term. Perhaps after the guidelines have been in use in the schools and certain other unforeseen technological developments occur, this term might be better defined. In the meantime, the media specialist and teacher should make sure that a tape is requested for "legitimate needs" which can be defined as being part of systematic instructional activities, directly related to teaching content, and intended to be shown in the classroom. Copies should not be made indiscriminately (Section 110).

While it does not have the force of law, this agreement will be considered by the court in determining fair use. If there is any doubt about a particular program, check with your local ETV station or directly with one of the groups mentioned below. (PBS Video, 475 L'Enfant Plaza, S.W., Washington, DC 20024; Television Licensing Center, 5547 N. Ravenswood, Chicago, IL 60640; Great Plains National Instructional Television, P.O. Box 80669, Lincoln, NE 68501; all have free newsletters.)

In addition, the Public Broadcasting Service, Public Television Library, Great Plains National Instructional Television Library, and Agency for Instructional Television also developed a joint policy statement. In essence, these four groups agreed to permit automatically, within certain limitations, off-the-air recording by schools of "public and instructional television programs distributed by them" and retention of such recordings for seven days. They each have agreements and/or newsletters listing those programs that schools can copy under this policy.

Library Audiovisual News Reproduction Rights

Section 108 of the new law grants libraries the right to reproduce and distribute "a limited number of copies and excerpts. . . of an audiovisual news program, subject to clauses (1), (2), and (3) of subsection (a)." Subsection (a) establishes the criteria for eligibility. A library would be eligible to engage in limited reproduction of news programs, if "(1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage; (2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers established with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and (3) the reproduction or distribution of the work includes a notice of copyright."

Public and Instructional TV Programs

Section 118 permits public broadcasters to use nondramatic musical works and published pictorial, graphic, and sculptural works without seeking individual permission and at predetermined fees. The fees are set either through voluntary negotiations or by the Copyright Royalty Tribunal. Public broadcasters who use these materials in their programs also have automatic rights to permit schools to make copies and retain them up to seven days. This limited provision extends

only to the types of works specifically named, however, and not to the entire program. It does not extend to other works included in the program or to the entire program itself.

Closed-Circuit Television

The transmission of videocassettes to classes through closed-circuit transmission systems remains an area of concern to educators. Section 110(2) states:

> (2) performance of a nondramatic literary or musical work or display of a work, by or in the course of a transmission, if—
>
> (a) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and
>
> (b) the performance or display is directly related and of material assistance to the teaching content of the transmission.

By definition, "literary works" are "other than audiovisual works" (Section 101). Because of this clause educational transmissions are limited to nondramatic literary or musical works—and audiovisual works are excluded by definition from this category.

While other sections of the *House Report* would indicate otherwise, the *House Report* does not supersede the law. While this seeming ambiguity in the law exists, in practice most distributors grant closed-circuit licenses free upon request, while others charge a small fee. Placing the statement on the order form for the video, "to be used for closed circuit purposes on this campus only," or other words to this effect, is recommended.

Local Video Rental

Because of the ease and convenience of renting videos from local retail outlets, teachers are beginning to rent videos for classroom use. While most uses for this purpose are legally permissible, some are not.

One of the conditions of Section 102 is that motion picture and video exhibition must be a part of "systematic instructional activities." This means that any showing of a video for purely entertainment purposes would be an infringement. For example, showing a video of *Romeo and Juliet* in an English class during a unit on Shakespeare would be permissible. Showing *Back to the Future* or other such entertainment features on a dull Friday afternoon without an instructional rationale would not. *House Report 94-1476* states:

> The "teaching activities" exempted by the clause encompass systematic instruction of a very wide variety of subjects, but they do not include performances or displays, whatever their cultural value or intellectual appeal, that are given for the recreation or entertainment of any part of their audience.

A display of a rented video for instructional purposes would include a library, gym, auditorium, or workshop, provided it is used as a classroom *(Commonsense Copyright: A Guide to the New Technologies).*

It is not a violation of copyright law to rent videotapes for classroom use if:

1. it is part of "systematic instruction,"
2. it is used in "face-to-face teaching," and
3. it is shown in "a classroom or other location devoted to instruction."

Such use is **prohibited** if:

1. it is shown for entertainment purposes, or
2. the showing is open to the community to attend.

It must be noted, however, that at this time most large districts do not allow this practice because of the difficulty in controlling it.

"For Home Use Only" Warnings

Labels on commercial videotapes labeled "for home use only," as well as other information supplied by the Motion Picture Association of America (MPAA), may read: "This videocassette is for home use nonpublic performance exhibition in the United States of America or Canada only. Any other use is not authorized and is prohibited."

This labeling is a statement of the rights accorded to copyright proprietors under Section 101. It does not prohibit educators from legitimate classroom use of a legally obtained copy. The rights of educators are in Section 110, which allows educators to display works in face-to-face learning situations; and in Section 109, which allows the possessor of a video to distribute a copy by resale, rental, or loan as in a library.

First Sale Doctrine

"The owner of a particular copy or phonorecord lawfully made under this title. . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord" (Section 109[a]). This is called the "first sale" doctrine. Under its provisions, after the first sale of a lawfully made copy, the owner may "sell or otherwise dispose" of it, notwithstanding the copyright owner's exclusive distribution right. A 1984 amendment has effectively prohibited record rental, and it is likely that Section 109 will be further amended in some fashion with respect to computer programs.

Satellite

Satellite dishes are becoming more common as schools and universities endeavor to provide distance education opportunities for their students. Programs **simultaneously rebroadcasted** at no charge to the public, such as NBC, CBS, and ABC, are permissible for downlink. However, programming from pay channels, such as the "Disney Channel" or "The Discovery Channel," require licensing. The use of these channels is governed by a different law, the Communication Act of 1934 (488 Stat. 1064), as amended (P.L. 98-549, Cable Communications Policy Act of 1984) to include satellite programming. This act does not employ the concept of fair use. Licensing information is available from satellite programming periodicals available off-the-counter, which contain phone numbers and licensing information, such as *SAT Guide: Cable Satellite Magazine*.

LIBRARY REPRODUCTION (SECTION 108)

Section 108 permits libraries to make copies of copyrighted works under certain limited circumstances. However, subsection (h) provides that the rights of reproduction and distribution set forth in Section 108 do **not** apply to "a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news..." except in circumstances involving duplication of an unpublished work or one which cannot be replaced at a fair price. The *House Report* concludes discussion of this section by noting: "Although subsection (h) generally removes musical, graphic, and audiovisual works" from explicit permitted copying, "it is important to recognize that the doctrine of fair use under Section 107 remains fully applicable to the photocopying or other reproduction of such works. In the case of music, for example, it would be fair use for a scholar doing musicological research to have a library supply a copy of a portion of a score or to reproduce portions of a phonorecord of a work. Nothing in Section 108 impairs the applicability of the fair use doctrine to a wide variety of situations involving photocopying or other reproduction by a library of copyrighted material in its collections, where the user requests the reproduction for legitimate scholarly or research purposes."

Sheet Music

Classroom uses of music and certain types of performances are subject to a narrower definition of "nonprofit" uses than before.

As with print materials, one may make a copy of a performable unit (movement, aria, etc.) for personal or nonprofit use and multiple copies may be made for classroom use of a small amount of any performable unit. The one exception to copying is the emergency performance rule. Emergency copies of an entire work can replace purchased copies which for any reason are not available for imminent performance, provided that the purchased copies are substituted later. For example, shortly before a school band is to play a concert the music teacher learns that six students have lost their music. The teacher is then entitled to make replacement copies for that performance. Later, the lost music would have to be found or purchased again.

Synchronization Licenses

For any use at which the public can attend, permission or licensing is required. For example, if an original slide/tape production were to be shown at a major convention (such as AECT), permission or licensing is required. A synchronization license allows the recording of music in synchronism or time-relation with a picture in the form of film, filmstrip, or video. In order to obtain music for synchronization rights there are two avenues: (1) to contact an agency which represents publishers, or (2) to contact an agency which handles cleared or production music produced for this kind of use.

The Harry Fox Agency (110 E. 59th St., New York, NY 10022) handles 3,500 publishers for synchronization license purposes to schools, industry, church, and civic organizations, and will forward a "request for quotation" form. If this information is needed more quickly, then provide the following information in a request: (1) name of institution, (2) name of program, (3) title and author of composition and publisher if it is known, (4) minutes/seconds of music needed, and (5) where program is to be shown/distributed. The time length is roughly two months if the agency represents the publisher. If not, it will send information on who does, if they have it.

Master Rights and Performance Licenses

To obtain previously recorded music protected by sound recording rights (it has a symbol,℗, on it), then master production rights must also be secured, usually from the recording company, in addition to the synchronization license. The recording company must then be contacted before the Fox Agency is contacted. Sound tracks also require a performance license. The nature of the performing rights (small or grand) depends on its use. It is advisable to obtain both at once.

Production Music Clearances

"Cleared" or production music is copyrighted but the distributor holds the rights and can authorize duplication, synchronization, performance, or transmission rights. Sound effect and production music libraries offer their music in more than one price structure (per use or "needle drop," unlimited use, annual agreement or "blanket" licenses, and single theme licenses), so it is wise to consider the scope of the use from all possible aspects. There are several agencies which provide these services. A list of these companies is in *The Copyright Directory: Volume 1: General Information* by Jerome Miller, and detailed information on using music for productions can be found in *A Copyright Primer for Educational and Industrial Media Producers* by Esther Sinofsky. (Both books are available from Copyright Information Services, P.O. Box 1460, Friday Harbor, WA 98250.)

Computer Software

Copyright protection for computer programs has been available since 1964. It is the most common format protection used, in addition to trade secrets and unfair competition. Section 117 as amended in 1980 (P.L. 96-517), now allows the owner of a program to make or authorize the making of a copy or adaptation provided that it is an essential step in the use of a program and that it is sold for archival purposes only and would be destroyed if the original was sold or given away.

The producer or copyright owner has the right to the reproduction of copies, production of derivative works (for various machines), distribution of copies, performance of a work if audiovisual (such as a video game), and display of a work, if graphic, publicly. In addition, making copies of the manuals or documentation without permission or purchase is an infringement. Libraries and media centers may make an archival copy to guard against damage. It should not be used as a second copy.

The user of a program may: (1) make an archival copy to guard against destruction or damage through mechanical failure; (2) make adaptations necessary to use the program correctly; and (3) add features to the program, so long as it is not sold or given away without the author's permission.

Public Domain and Shareware

Programs in the public domain can be freely used because they are not copyrighted. "Shareware" is a term for a method of distribution. Some shareware programs are copyrighted. Most shareware programs require the purchaser-leasee to send in money to obtain a manual and become "registered" for program updates. Registration is not synonymous with copyright. The purchaser can decide whether the extra manual is necessary or not. A shareware program can be subject to copyright and optional registration. If the program is copyrighted, the © symbol will appear on: (1) the label, (2) the package, and/or (3) the introductory screen.

Databases and Database Downloading

Automated databases are copyrightable as compilations (Section 101). "Downloading" involves the transmission of data from a remote or host computer to the user's on-site storage device for searching, manipulation, or storage. While legal scholars agree that downloading much of a database is infringement and downloading a few records is not, uses in the middle range rest upon the circumstances of the case. INSPEC and other vendors make distinctions of time

and purpose in determining infringement. Temporary storage is considered part of the lease agreement. Long-term storage will vary with the license. Other uses, such as multiple copying of data, specialized database construction, and information reviews, are subject to permission. The construction of databases with copyrighted material is subject to copyright restrictions. Since the author or copyright proprietor has the right of reproduction, merely reproducing the material into a database is an infringement, as is distributing it (another copyright proprietor's right). If the work is translated (adapted) from print to machine-readable form, it is also a derivative work and making this adaptation is also an infringement. Lastly, it is possible to display a work by recreating ("digitizing") it on a computer monitor. To display it without permission is an infringement.

Development of databases from copyrighted sources in computer, microfiche, video, compact disk or other optical technologies or formats requires that permission be secured from the author for the right to copy the material into a database and permission also be secured to distribute the database. Placing an entire copyrighted work or a substantial part of it into a database without permission is infringement.

Optical Storage Media

Computer-driven interactive systems utilizing optical technology (interactive videodisks, cd rom [compact disc read only memory], worm [write once read many times] erasable, etc.) have many of the same restrictions that apply to database downloading, as well as those that apply to computer software. Fair use might apply for demonstration purposes. The rights of reproduction, adaptation, distribution, and public display also apply. Displaying a product could also be infringement. How these uses are viewed depends to a great extent on the terms of the product lease. Currently, these terms vary considerably.

It is now possible to copy a compact disc. If an archival copy is needed, then consult the lease contract, since most compact disc products require the return of the original. In no instance should the disc be used as an additional copy. Leasing terms are undergoing rapid changes as the industry expands.

It should be noted, however, that compact disc products are usually designed to download or display information, so the issues of downloading are usually software engineering issues—i.e., the software can be designed to download or print a certain number of records at a time, among other possible controls. Networking an optical product on multiple cd rom readers requires a networking license, just as with other software. Integrating audio compact discs with other media requires the same licenses and permissions as other forms of music if the final production is presented to the public.

Telefacsimile Communications

The use of telefacsimile ("fax") communications for interlibrary loan has grown dramatically in the last few years. While special, academic, and public libraries have pioneered this use, the development of "fax" boards for computers and the growing sophistication of integrated technologies have brought telefacsimile communications to schools and other institutions, as well.

Current usage practices indicate that fax transmissions are considered as a fast courier for interlibrary loan. A log should be kept of articles, etc., that are faxed, and those materials that are interlibrary loaned via fax. A conservative interpretation is that in all transmissions the original would be discarded and American Library Association guidelines for interlibrary loan would be maintained.

Legal opinion is still forming in this area, as fax communications are not sufficiently established to warrant an agreed upon mechanism for copyright protection.

WORK FOR HIRE

A "work for hire," a work written by an employee or contractor within the scope of employment (Section (101)(201)[b]), can either be:

1. prepared by an employee within the scope of his or her employment, or
2. a work specifically commissioned (for example as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, supplementary work, compilation, instructional text, test, answer material for a test, or atlas).

If the work is commissioned, then a written contract should be signed by the parties stating the purpose of the work commissioned by the institution and the rights and obligations of the author and the institution, including the sale, license, lease, or use of the work. Absent agreement, it is usually considered that work undertaken during normal working hours belongs to the institution. Before an employee engages in producing a work, it is best for all concerned that a discussion be initiated to determine if a contract is necessary or if work should or could be done outside of the place of employment or beyond normal working hours.

MEDIA CENTER LENDING

All media, whether computer software, videocassettes, or other media, should have:

1. a copyright notice clearly placed on the label: "Notice: This material is protected by copyright law (Title 17 U.S. Code)," and
2. a copy of the terms of the license attached to the package.

Staff bringing copies to the media center to be placed into the lending or reserve collection should be required to sign a form stating that the copy is legally obtained.

UNSUPERVISED REPRODUCTION EQUIPMENT

Unsupervised reproduction equipment, whether videocassette recorders, microcomputers, or photocopiers, should have a notice clearly displayed on or near the equipment: [Computer programs, videocassette programs, books and periodicals] are protected by copyright law (Title 17 U.S. Code). Unauthorized copying may be prohibited by law.

LICENSING AGREEMENTS

In planning to reproduce or use copyrighted material such as software, videos, or other media on a continuing basis, consider entering into a licensing agreement with the holder of the copyright. (See also **ICCE Statement on Software Copyright** and **Video Permissions and Licenses** sections.) A licensing agreement is a contract. The one who grants the license for use of his or her materials is the "licensor" and the other party is the "licensee." While a licensing agreement need not be an extraordinarily complicated document, certain considerations should be addressed. As with any legal agreement covering the transfer of rights, qualified legal advice should be obtained to ensure that the rights of both parties are protected.

The following is an outline of the basic contents of a licensing agreement. It should be remembered that these elements may not be relevant to all licensing agreements and there may be certain circumstances which will require the addition of other contractual language. Licenses will vary from company to company, but the essential elements of any agreement include the following:

1. Term

The term or specific period of time during which the license is to be in effect should be stated. It is best to specify a definite number of months for the duration of the license rather than a formula or qualified set of circumstances governing the time, which may be open to interpretation. Educational institutions may have

to limit licenses to one year because they are not allowed to enter into contractual agreement for a longer period of time.

2. Fee

The fee is the amount of money paid for license rights. The agreement should specifically state the amount of money, as well as the method of calculation, if any. The method and time of payment should also be indicated, e.g., "An initial payment of $1,000 will be due to the Licensor upon the signing of this Agreement, the balance of $2,000 to be paid on (date)." Some typical bases for the fee include flat fee, fee per copy, per student, per building, per district, or per television monitor.

3. Grant of right

This paragraph should spell out in detail exactly what rights are covered by the license. The rights may cover aspects such as duplication, method of utilization, use of excerpts, conversion into other languages, or incorporation as part of a larger program. They can be granted on either an exclusive or nonexclusive basis. Presently, licenses are being utilized primarily for duplicating films onto videotape, televising films by closed-circuit or open-circuit systems, and for duplicating records onto audiocassettes. Licenses are also used for video public performances outside the classroom. Undoubtedly there will be special situations when the licensee will want other rights. Since it is beyond the scope of this *Guide* to anticipate all situations which might arise, this outline should serve only as a foundation for constructing other kinds of licensing agreements.

4. Restrictions on use

If use of licensed material is restricted in any manner, it will be stated in the license. Included among such restrictions might be: the right to alter the material by changing the order of presentation, public performance for which an admission fee is charged, broadcast on commercial television, etc. When in doubt, it is advisable to list explicitly all of the rights being granted and, at the same time, list all of the rights which are retained by the licensor.

5. Titles

Specify with sufficient clarity for accurate identification the titles to which rights are licensed. Unless the number is voluminous, the titles should be listed separately. If there are a large number, they they can be referred to by the series title. In some instances, it might suffice to refer to all of the materials covered by the license as a whole. For example, the agreement might merely say that all of the licensor's films owned by the licensee are included under the terms of the license.

6. Copyright notice and other titles

The licensee will be obligated to reproduce a copyright notice in the manner prescribed by law to protect the rights of the producer. The licensee will also be expected to retain all of the title credits, acknowledgements, or other introductory matter listed on the product.

7. Limitations on use

The copyright owner may want to limit the area or place where the material may be used, such as specific physical facilities within a defined geographical area. If copies are to be handled in any manner outside a central location, limitations may be placed on the distribution of these copies to ensure compliance with the provisions of the agreement.

8. Warranties

Each party should warrant that they have the authority to enter into the license agreement.

9. Inspection

The producer may want the right to inspect the operations of the licensee to ensure compliance with the terms of the license, including examination of records when the fee is contingent upon a variable factor, such as the number of students, copies, etc.

10. Quality standards

The licensee may be obligated to use its "best effort" to maintain acceptable quality standards in the copies it makes.

11. Destruction

A provision may be made for destruction or erasure of copies after termination of the licensing agreement. To ensure compliance, such destruction may be certified by an authorized individual.

12. Jurisdiction

The license should specify the jurisdiction (the state) whose laws will apply to an interpretation of the agreement. In most instances this will be the law of the state in which the licensor is located.

Since a license is a form of contract, all remedies available under the contract law of the state are available to a plaintiff in the event of a license violation. In addition, copyright case law has built up the principle that if there is a proven violation under the copyright provision of the licensing agreement, the licensor can consider the agreement void; any continued activity by the licensee would be a violation of the copyright law. Copyright violation has been considered to be retroactive in many instances to include those activities occurring before the breach of the agreement.

SEEKING VIDEO LICENSES

Beda Johnson, author of *How to Acquire Legal Copies of Video Programs,* suggests that there are many avenues in obtaining rights to show videos. There are many free sources, such as National Geographic, Phillips Petroleum (Challenge of the Unknown, Search for Solutions, etc.), universities, embassies, and programs listed in the Television Licensing Center Guide and in the PBS Guide. In addition, these shortcuts are suggested:

1. Keep resource materials at hand, such as *The Video Source Book, The Video Tape and Disc Guide to Home Entertainment, The Educational Film/Video Locator, The Copyright Directory,* and *Video Copyright Permissions,* as well as other materials, to identify and locate programs.
2. Request catalogs from companies which allow or consider licensing.
3. Request vendor catalogs.
4. If the program is not listed as currently available, inquiry should be made immediately for greatest possibility of obtaining licensing.
5. Document all inquiries regarding program rights.

HOW TO SEEK PERMISSION

If the proposed use of a copyrighted work is outside the scope of fair use or other relevant sections of the new law which permit such use, you must obtain permission from the copyright owner.

To determine who holds the copyright, first check the copyright notice. Under U.S. copyright law, the notice of copyright (which consists of the word "copyriqht" or the © symbol, year of creation or publication, and the name of the copyright owner) must appear on the work. If the work does not contain a notice, it is reasonable to assume it is not covered by copyright. In the case of a filmstrip

or motion picture, the notice usually appears on or near the main title frame or credits; for a sound recording, on the record label; for tape cassettes and cartridges, on the label or container; and for a book or other printed publication, on its title page or the page immediately following. The law does not state that the notice must be in any specific place but rather "in such manner and location as to give reasonable notice...." If the address of the copyright owner does not appear with the copyright notice or elsewhere in the material, it may be found in the *Audiovisual Marketplace* or the *Literary Marketplace* (both publications of the R. R. Bowker Company), or in the "Code Section" of the Indexes published by The National Information Center for Educational Media (NICEM). These publications should be available in most libraries.

The copyright notice will also list all acknowledgements of other copyrighted materials used in the work. In this instance, the "acknowledgement" indicates that some materials were originally published elsewhere, and that the copyright for these materials remains with the original owner. Checking these acknowledgements, when requesting permission to duplicate, will let you know whether the specific materials you wish to use are the property of an author, publisher, photographer, or composer other than the producer of the primary material you are using.

Obtaining permission to use copyrighted audiovisual materials is sometimes complicated by the fact that rights for such materials fall into three categories: rights for the underlying book or script, the rights for visuals, and the rights for the music and voices. Since rights obtained from third parties by the producers of audiovisual materials are often strictly limited, producers must verify that they control all the necessary rights before they can grant permission to duplicate or perform. This might involve reviewing contracts with authors, consultants, composers, photographers, artists, etc.; permissions obtained for music; and all voice and model releases. Permission to duplicate or televise may have to be denied simply because the producer does not control one or more of the necessary rights.

Once you have determined to whom you should apply for permission to duplicate or transmit a work, you need to decide what kind of permission you will request—is the duplication or transmission to occur only once or are you seeking permission to reproduce the material on a continuing basis? In both instances, you will be considering some form of a licensing agreement, although the form for a single use will undoubtedly be far simpler and there may be no charge for such a use.

PERMISSION FOR ONE-TIME DUPLICATION OR TRANSMISSION

To authorize reproduction of copyrighted materials, the producer will need the following information:

1. The full and correct title of the material

2. An exact description of the material to be used (i.e., text, visuals, or soundtrack)

If requesting rights to use text material, provide the page number and exact quote (or several words from the beginning and several from the end of the portion to be used).

If requesting use of visuals from a film, filmstrip, or slide program, frame numbers should be cited.

3. Type of reproduction

If the materials are to be transferred to another format, the reason for the change should be supplied.

4. Number of copies to be made

5. Use to be made of reproduced material

If the material is a videocassette, specify whether the intended use involves single-receiver playback or multiple receivers. If the intended use involves transmission of the material, specific information should be supplied as to the method of transmission: whether radio or television, open or closed circuit. In such cases, many license agreements will also require the number of students in the intended audience (see number 6 below).

6. Distribution of the reproduced material

If transmission is involved, information should be provided on the extent of the reception area and the probable number of viewers: i.e., at the elementary and secondary level, the number and type of buildings, number of students in each building and the number of playback units could be included; on the higher education level, the number of campuses, etc.

7. Whether or not the material is to be sold and/or whether there will be a charge for the viewing

A request for permission to reproduce copyrighted materials should be sent, together with a self-addressed return envelope, to the Permissions Department of the copyright owner.

Because each request must be checked, frequently at great length if third parties are involved, allow enough time to obtain the permission before the materials are needed. (The plea, "We're beginning this course next week," is often likely to draw an immediate denial of rights in the absence of sufficient lead time.) Granting permission to reproduce copyrighted materials is often not a simple "yes" or "no" matter. Although some producers are generous in allowing nonprofit organizations to reproduce their materials, they must first review the status of the copyright to determine whether or not they have the power to grant permission. Regardless of the standard policy a producer may have regarding the granting of duplication rights, each request requires a careful checking of the exact materials to be duplicated.

Here are some helpful hints from producers who are involved daily in processing requests to reproduce copyrighted works:

1. You may want to phone first. However, since verbal permission is inadequate and is no protection in case of a misunderstanding, write and provide the specific information indicated previously, and refer to this data and time of phone call and contact person in your letter.
2. Don't seek blanket permission, unless absolutely essential. This will require a more formal licensing agreement.
3. Allow sufficient lead time for the copyright owner to process your request.
4. Be sure to include your complete return address.
5. Be sure that you are able to comply with all the terms of the permission grant, which may include certifying that videotaped material has been erased following limited use for the specific time period.
6. Fully identify the person and institution making the request.
7. MOST IMPORTANT: CHECK AND DOUBLECHECK TO SEE THAT ALL YOUR INFORMATION IS COMPLETE. THE MORE COMPLETE THE REQUEST, THE MORE RAPID THE RESPONSE.

SAMPLE REQUEST FOR PERMISSION

April 2, 1976

Permissions Department
XYZ Company
111 Main St.
Anytown, U.S.A. 11111

Dear Sir or Madam:

I would like permission to use five frames from one of your filmstrips. These frames, showing the ring-formation of a young tree, will be combined for presentation with frames from filmstrips from two other companies showing the development of the tree through the years.

Title: Trees and Their Importance
Collaborator: William M. Harlow
Color Film Number 2392

Material to Be Duplicated: Frames 245, 246, 247, 248, and 249

Type of Reproduction: Color slides will be made of each frame.

Number of Copies: Only one copy will be made of each frame.

Use to Be Made of Copies: The five slides will be shown in sequence with three slides each copied from two other filmstrips.

Distribution of Copies: The slide presentation will be shown via carousel projector to three classes of sixth-grade science students. Average class size is 35.

A self-addressed envelope and a copy of this letter for your files are enclosed for your convenience.

Please let us know what conditions, if any, apply to this use.

Sincerely,

John Smith
Media Director

JS:cmh

Permission granted: _____ _____
Signature Date

Conditions, if any: _____ _____

_____ _____
Signature Date

COPYRIGHT POLICY DEVELOPMENT

The development of a sound copyright policy is the first step toward protecting the institution and its personnel. It provides directions for all employees and reduces the number of requests for materials which are infringements, thereby taking away the burden of responding to individual queries from the media center director or library media specialist. It also provides written authority to refuse illegal requests. Because of all the above, it ultimately reduces the possibility of costly court cases.

Charles Vlcek, author of *Copyright Policy Development,* suggests that the elements of a good copyright policy should include the following:

1. A statement that the board intends to abide by the copyright law: School Board employees may reproduce copyrighted materials only under the exemption provisions of the copyright laws currently in force under Title 17 of the United States Code.
2. A statement prohibiting copying not specifically allowed by the copyright law, fair use guidelines, license agreements, or proprietor's permission: Any reproduction of copyrighted materials will be done only when specifically allowed by the law, within the bounds of fair use guidelines, under license agreement or written permission of the copyright holder.
3. A statement placing the liability for willful infringement upon the person making or requesting the copy:

   The individual responsible for reproduction may be liable for breach of copyright under existing laws.

   [Institution] in recognizing the importance of the Copyright Law of the United States (Title 17, United States Code) hereby notifies all employees that a willful infringement of the law may result in disciplinary action.

   In the case of a court action for damages, a finding of willful infringement would preclude the School Board paying any judgment rendered against the employee and paying any attorney's fees or costs which the employee would incur in conjunction with a lawsuit and may render the employee liable to the School Board for any damages which the School Board is liable to pay.
4. A statement that creates the position of copyright officer for the institution.
5. A statement mandating the development of a copyright manual detailing what copying can and cannot be done by the institution's employees.
6. A statement mandating placement of appropriate notices on or near all print, video, or computer equipment capable of making copies.
7. A statement mandating the development and retention of appropriate copyright records.

FAIR USE: YES OR NO?

The following are some examples of situations regarding the use of copyrighted materials. **These examples represent the views of the authors and should not be considered legal opinion.**

1. A library buys one copy of a 16mm educational film and makes a videocassette copy for use in the library's videocassette playback area.

This case is a clear-cut example of copyright infringement resulting from utilization of new technology. The copyright laws forbid the reproduction of a copyrighted work by anyone except the copyright proprietor. The fact that the library bought the copyrighted work does not mean it bought the rights to reproduce it.

2. A media center coordinator salvages some useful frames from discarded filmstrips and converts them into slides for student use.

This illustrates a classic problem which arises under the doctrine of fair use. The salvaging of useful frames from a discarded filmstrip may seem to be harmless if the number of frames used is very small and if the filmstrip is one which the school is no longer purchasing. However, the fact that the school has discarded the filmstrip does not mean that copyright protection has expired, and also does not mean that the copyright proprietor has not suffered an economic loss. Also, if the sequence of the visuals is changed it might result .in the creation of a new derivative work which may not accurately state the author's view. Preparing derivative works is a right reserved to the copyright proprietor.

3. A student prepares an audio report on new travel books in the school library and uses "Around the World in Eighty Days" as background music.

The issue presented here involves the appropriation of a copyrighted musical composition. However, this situation is comparable to an individual taping musical works in his own home for his own personal use and would be considered fair use, as distinguished from a teacher making copies for students who constitute a broader audience.

4. A media director occasionally makes a videotape of a preview print of a 16mm film in order to allow preview over a longer period of time.

The situation presented here is the unauthorized duplication of a copyrighted work. This is illegal, regardless of the fact that this particular use of the videotape may be less harmful to the copyright proprietor than a situation in which the videotapes were used for student viewing. Permission should be obtained from the copyright proprietor.

5. A high school student uses an opaque projector to enlarge a map from his geography book to help him draw a poster showing the location of Indian reservations.

Clearly this is allowed under the law.

6. The Department of Televised Instruction of a school district uses a film chain device to televise 16mm educational films from its library to every school within the district over its closed circuit system.

The fundamental issue presented here is that the televising of motion picture film constitutes a performance of that film. The right to "perform" a motion picture is one of the sole rights of the copyright holder. Although there are certain exceptions to that right in the new law, they do not apply to motion pictures or filmstrips. Permission is required and can usually be negotiated at the time the film is leased.

7. The Department of Televised Instruction of a school district makes a videotape copy of a film in order to televise it on the closed-circuit system utilized by the district for all classrooms within its jurisdiction.

A copy has definitely been made and this constitutes an infringement of the rights of the copyright proprietor, both in terms of the "performance" on television and the duplication of the film.

8. A librarian makes multiple cassette copies of classical music albums in their entirety because the albums are not available in cassette form.

Unavailability of a particular format is not justification for making copies of otherwise available phonorecords. The only circumstances recognized in the law that permit copying of entire phonorecorded works are unavailability at a fair price or preservation and protection of unpublished material. It is best to ask permission from the producer.

9. A teacher tapes a lesson for instructional television, illustrating the topic with various film clips from the district's circulating film library.

In defining fair use in connection with an educational motion picture film, the teacher must keep in mind that it is not sufficient to use the "quantitative test" without taking all of the other criteria into consideration. For example, 1 minute from a 15-minute educational motion picture may be the very essence of that product—illustrating a natural phenomenon which is very difficult to put on film and occurs only very rarely (e.g., the eruption of a normally dormant volcano, the emergence of the mayfly, etc.). The unauthorized duplication of even a small segment may very well fall outside the bounds of fair use. Therefore, the other elements of the doctrine must be examined carefully (i.e., the nature of the work, and the effect of the use upon the potential market for the work).

10. A teacher requests the media center to copy various musical selections from radio programs onto audiotape in order to illustrate the forms of certain kinds of musical composition.

Radio programs can be and are ordinarily copyrighted. Off the-air taping would likely constitute an infringement, unless the fair use test is met.

11. A professor has used a film in her class and wishes to review the film with her students by selecting specific frames from it. She makes a 35mm color slide of each of the individually selected 16mm frames.

This case also involves the "amount and substantiality" criterion for determining fair use, as described in situation 9. In **most** cases, this would be fair use.

12. A teacher introduces a new workbook to the class and makes an overhead transparency of one page so that he can demonstrate how the students will work in their own books.

This particular situation would be defined as a fair use.

13. The audio portion of an evening television documentary on drug abuse is taped by a media coordinator for playback the next day.

The sound track of a film product is protected by copyright to the same extent as the visual materials. However, this use is covered by the off air taping guidelines.

14. Students in a high school photography class want to use a song from a currently popular record as background music for a slide program produced as a class project. One of the students owns the record. The finished program will probably be shown at a school assembly and may

be shown to some parents' groups. Copies will not be sold and there will not be an admission charge to see the program.

Uses of copyrighted music which are presented beyond the scope of a class to members of the public at large, which include parent's groups, require permission. Showing it at a school assembly to which only students could attend would require permission in writing from the recording company and/or agency ahead of time. Using "cleared music" is easiest, as getting permission without paying a fee is unlikely and time consuming.

15. A media center director makes a copy of audio records and tapes in the center to use as masters if the circulation copies are damaged.

This practice is clearly not within the bounds of fair use because it deprives producers of sales. Some companies have established policies which allow duplication—with or without a fee for this purpose, but permission must be obtained. The only circumstance under which this practice would be permitted is when the media center, after reasonable effort, determines that an unused copy cannot be obtained at a fair price.

16. Can a media center director/librarian send around a list of possible programs that a teacher might like to request for off-air taping?

Yes. A listing of available programs can be sent to teachers. However, off-air taping should only be done at the request of the individual teacher for each program.

17. A librarian is requested to make a copy of short segments of commercial television programs for classroom teachers for instructional purposes on rare and timely issues, such as child abuse, teenage alcoholism, etc.

Yes, provided that the guidelines are followed. Should an instructor wish that the segment be kept in the library for use in later classes it would be safest to request permission. If the teachers wished to have what might be termed "fair use" segments (brief, illustrative of an idea or attitude) to be kept in the library this would likely be permissible.

18. A media center director is asked to add pirated videos to the school's collection. If accepted, would he/she be legally responsible?

Yes. Knowingly accepting pirated copies of any media into the school's collection is infringement for both parties.

19. I would like to use 30 seconds of a popular song as a lead-in and again at the credits for a presentation I am developing on interactive video. Do I need a license?

Yes, if you will be showing this video at conventions, such as AECT, or to other groups to which the public can attend. Contact the Harry Fox Agency or other such agency, or the record company. Otherwise, consider using cleared music from one of the many companies that provide this. (See section on synchronization rights.)

20. A teacher would like to show a rented video of *Star Wars* on the last day of school. Is this permissible?

No, if it is shown solely for entertainment purposes. Only uses which are part of "systematic instructional activities" are permissible. Because this video would likely be presented for entertainment, the classroom exception would not apply. However, if the video were rented through a standard film and video catalog which provides "nontheatrical performance rights" with the rental, the use would be permissible.

21. A computer coordinator has some programs that can be multiply booted (loaded into more than one machine). Is it legal to do this?

No, it isn't, unless a site license or multiple copy license has been obtained from the publisher. In practice, some programs can be used this way, such as word processing and database management programs. However, multiple booting of a program is considered to be much the same as making pirated copies.

22. Should I request an archival copy (backup) when purchasing school software?

Yes, always. These magnetic media are fragile. Power surges, human misuse, disk drive problems, etc., can ruin a disk. An archival copy can be used in place of the original until a new disk is received. Many producers will send a replacement disk for a small fee if the original is returned.

23. I purchased a program that is copy protected, and a backup was not supplied. May I use a "nibble copier" or "locksmith" program to make a backup?

Yes, if the producer will not supply one. The law states that the purchaser of a program may make or authorize the making of an archival copy to guard against human or mechanical damage. It is your legal right to make one archival

copy. The purpose of an archival copy is only to keep one in an archival file. A backup copy is not to be used as a **second copy** of the original; it is only to be used in the event of damage to the original.

24. There is one cd rom product for one machine. Can it be networked on others, as well?

No. The terms of the lease are usually per machine and network licenses are becoming more available. Often there is a reasonable license fee to network the program or to copy it and boot it up on another machine. Check with the producer.

25. A computer coordinator makes copies of a program for students to use at home. The program will not be given away or sold, and all the copies will be returned.

No. Regardless of how the copies are handled, it is illegal to make multiple copies of a program.

26. May the media center make an archival copy of a computer program kept on its reserve shelf?

Yes, provided that the archival copy is destroyed when the program is taken off the reserve shelf.

27. The media center director learns that a staff member is duplicating copyrighted software on the media center's public access computer.

The director should notify the staff member that the use is illegal. Copyright warning notices also should be posted near the computers.

28. In the case of an infringement lawsuit, where a media center director was involved, who would be sued?

The institution, the infringer, and anyone who may have helped the infringement to take place, if applicable, would all be named in the suit.

29. A teacher would like to combine audio compact disc (music) with a cd rom program to produce a program for performance in a classroom demonstration.

This is permissable. If this production were to be shown at a national convention, also open to the public, music licensing would have to be obtained first.

AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS

WITH RESPECT TO BOOKS AND PERIODICALS

The purpose of the following guidelines is to state the minimum standards of educational fair use under Section 107 of H.R. 2223. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future, that certain types of copying permitted under these guidelines may not be permissible in the future, and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 1107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

GUIDELINES

I. Single Copying for Teachers

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

A. A chapter from a book;

B. An article from a periodical or newspaper;

C. A short story, short essay or short poem, whether or not from a collective work;

D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.

II. Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion, ***provided that:***

A. The copying meets the tests of brevity and spontaneity as defined below;

and

B. The copying meets the cumulative effect test as defined below; ***and***

C. Each copy includes a notice of copyright.

Definitions

Brevity

(i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages; or (b) from a longer poem, an excerpt of not more than 250 words.

(ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words; or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits stated in "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or an unfinished prose paragraph.]

(iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(iv) "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "ii" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof may be reproduced.

Spontaneity

(i) The copying is at the instance and inspiration of the individual teacher, and

(ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect

(i) The copying of the material is for only one course in the school in which the copies are made.

(ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

(iii) There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

III. Prohibitions as to I and II Above

Notwithstanding any of the above, the following shall be prohibited:

(A) Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts there from are accumulated or reproduced and used separately.

(B) There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.

(C) Copying shall not:

(a) substitute for the purchase of books, publishers' reprints or periodicals;

(b) be directed by higher authority;

(c) be repeated with respect to the same item by the same teacher from term to term.

(D) No charge shall be made to the student beyond the actual cost of the photocopying.

Agreed MARCH 19, 1976.

Ad Hoc Committee on Copyright Law Revision:

By SHELDON ELLIOTT STEINBACH.

Author-Publisher Group:

Authors League of America:

By IRWIN KARP, *Counsel.*

Association of American Publishers, Inc.:

By ALEXANDER C. HOFFMAN,
Chairman, Copyright Committee.

GUIDELINES FOR EDUCATIONAL USES OF MUSIC

The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under Section 107 of HR 2223. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future, that certain types of copying permitted under these guidelines may not be permissible in the future, and conversely that in the future other types of copying which are not permitted under these guidelines may be permissible under revised guidelines.Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in

Section 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

A. *Permissible Uses*

1. Emergency copying to replace purchased copies which for any reason are not available for any imminent performance provided purchased replacement copies shall be substituted in due course.

2. (a) [amended] For academic purposes other than performance, single or multiple copies of excerpts of works may be made, provided that the excerpts do not comprise a part of the whole which would constitute a performable unit such as a section, movement or aria, but in no case more than 10% of the whole work. The number of copies shall not exceed one copy per pupil.

(b) For academic purposes other than performance, a single copy of an entire performable unit (section, movement, aria, etc.) that is, (1) confirmed by the copyright proprietor to be out of print or (2) unavailable except in a larger work, may be made by or for a teacher solely for the purpose of his or her scholarly research or in preparation to teach a class.

3. Printed copies which have been purchased may be edited or simplified provided that the fundamental character of the work is not distorted or the lyrics, if any, altered or lyrics added if none exist.

4. A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher.

5. A single copy of a sound recording (such as a tape, disc or cassette) of copyrighted music may be made from sound recordings owned by an educational institution or an individual teacher for the purpose of constructing aural exercises or examinations and may be retained by the educational institution or individual teacher. (This pertains only to the copyright of the music itself and not to any copyright which may exist in the sound recording.)

B. *Prohibitions*

1. Copying to create or replace or substitute for anthologies, compilations or collective works.

2. Copying of or from works intended to be "consumable" in the course of study or of teaching such as workbooks, exercises, standardized tests and answer sheets and like material.

3. Copying for the purpose of performance, except as in A(1) above.

4. Copying for the purpose of substituting for the purchase of music, except as in A(l) and A(2) above.

5. Copying without inclusion of the copyright notice which appears on the printed copy.

1987 Statement on Software Copyright
An ICCE Policy Statement

Permission to reprint all or part of this document is granted. Please acknowledge the ICCE Software Copyright Committee.

Background

During 1982-83, educators, software developers, and hardware and software vendors cooperated to develop the **ICCE Policy Statement on Network and Multiple-Machine Software**. This Policy Statement was adopted by the Board of Directors of the International Council for Computers in Education (ICCE) in 1983, and was published and distributed. It has received support from hardware and software vendors, industry associations and other education associations. One component of the Policy Statement, the "Model District Policy on Software Copyright," has been adopted by school districts throughout the world.

Now, three years later, as the educational computer market has changed and the software market has matured, ICCE has responded to suggestions that the policy statement be reviewed by a new committee and revisions be made to reflect the changes that have taken place both in the marketplace and in the schools.

The 1986-87 ICCE Software Copyright Committee is composed of educators, industry associations, hardware vendors, software developers and vendors, and lawyers. All the participants of this new Committee agree that the educational market should be served by developers and preserved by educators. To do so requires that the ICCE Policy Statement be revisited every few years while the industry and the use of computers in education are still developing.

Responsibilities

In the previous Policy Statement, lists of responsibilities were assigned to appropriate groups: educators, hardware vendors, and software developers and vendors. The suggestion that school boards show their responsibility by approving a district copyright policy was met with enthusiasm, and many districts approved a policy based on the ICCE Model Policy. The suggestion that software vendors adopt multiple-copy discounts and offer lab packs to school was likewise well received; many educational software publishers now offer such pricing. It is therefore the opinion of this committee that, for the most part, the 1983 list of recommendations has become a *fait accompli* within the industry, and to repeat it here would be an unnecessary redundancy.

Nevertheless, the Committee does suggest that all parties involved in the educational computing market be aware of what the other parties are doing to preserve this market, and that the following three recommendations be considered for adoption by the appropriate agencies.

School District Copyright Policy

The Committee recommends that school districts approve a District Copyright Policy that includes both computer software and other media. A Model District Policy on Software Copyright is enclosed.

Particular attention should be directed to item 5, recommending that *only one* person in the district be given the authority to sign software licensing agreements. This implies that such a person should become familiar with licensing and purchasing rights of all copyrighted materials.

Suggested Software Use Guidelines

In the absence of clear legislation, legal opinion or case law, it is suggested that school districts adopt the enclosed Suggested Software Use Guidelines as guidelines for software use within the district. The recommendation of Guidelines is similar to the situation currently used by many education agencies for off-air video recording. While these Guidelines do not carry the force of law, they do represent the collected opinion on fair software use for nonprofit education agencies from a variety of experts in the software copyright field.

Copyright Page Recommendations

The Committee recommends that educators look to the copyright page of software documentation to find their rights, obligations and license restrictions regarding an individual piece of software.

The Committee also suggests that software publishers use the documentation copyright page to *clearly* delineate the users' (owners' or licensees') rights in at least these five areas:

1. How is a backup copy made or obtained, how many are allowed, and how are the backups to be used (e.g., *not* to be used on a second machine at the same time)?
2. Is it permissible to load the disk(s) into multiple computers for use at the same time?
3. Is it permissible to use the software on a local area network, and will the company support such use? Or is a network version available from the publisher?
4. Are lab packs or quantity discounts available from the publisher?
5. Is it permissible for the owner or licensee to make copies of the printed documentation? Or are additional copies available, and how?

ICCE—Suggested Software Use Guidelines

The 1976 U.S. Copyright Act and its 1980 Amendments remain vague in some areas of software use and its application to education. Where the law itself is vague, software licenses tend to be much more specific. It is therefore imperative that educators read the software's copyright page and understand the licensing restrictions printed there. If these uses are not addressed, the following Guidelines are recommended.

These Guidelines do not have the force of law, but they do represent the collected opinion on fair software use by nonprofit educational agencies from a variety of experts in the software copyright field.

Backup Copy: The Copyright Act is clear in permitting the owner of software a backup copy of the software to be held for use as an archival copy in the event the original disk fails to function. Such backup copies are not to be used on a second computer at the same time the original is in use.

Multiple Loading: The Copyright Act is most unclear as it applies to loading the contents of one disk into multiple computers for use at the same time. In the absence of a license expressly permitting the user to load the contents of one disk into many computers for use at the same time, it is suggested that you *not* allow this activity to take place. The fact that you physically can do so is irrelevant. In an effort to make it easier for schools to buy software for each computer station, many software publishers offer lab packs and other quantity buying incentives. Contact individual publishers for details.

Local Area Network Software Use: It is suggested that before placing a software program on a local area network or disk-sharing system for use by multiple users at the same time, you obtain a written license agreement from the copyright holder giving you permission to do so. The fact that you are able to physically load the program on the network is, again, irrelevant. You should obtain a license permitting you to do so before you act.

Model District Policy on Software Copyright

It is the intent of [district] to adhere to the provisions of copyright laws in the area of microcomputer software. It is also the intent of the district to comply with the license agreements and/or policy statements contained in the software packages used in the district. In circumstances where the interpretation of the copyright law is ambiguous, the district shall look to the applicable license agreement to determine appropriate use of the software or the district will abide by the approved Software Use Guidelines].

We recognize that computer software piracy is a major problem for the industry and that violations of copyright laws contribute to higher costs and greater efforts to prevent copying and/or lessen incentives for the development of effective educational uses of microcomputers. Therefore, in an effort to discourage violation of copyright laws and to prevent such illegal activities:

1. The ethical and practical implications of software piracy will be taught to educators and school children in all schools in the district (e.g., covered in fifth-grade social studies classes).
2. District employees will be informed that they are expected to adhere to section 117 of the 1976 Copyright Act as amended in 1980, governing the use of software (e.g., each building principal will devote one faculty meeting to the subject each year).
3. When permission is obtained from the copyright holder to use software on a disk-sharing system, efforts will be made to secure this software from copying.
4. Under no circumstances shall illegal copies of copyrighted software be made or used on school equipment.
5. [Name or job title] of this school district is designated as the only individual who may sign license agreements for software for schools in the district. Each school using licensed software should have a signed copy of the software agreement.
6. The principal at each school site is responsible for establishing practices which will enforce this district copyright policy at the school level.

The Board of Directors of the International Council for Computers in Education approved this policy statement in January, 1987. The members of the 1986 ICCE Software Copyright Committee are:

Sueann Ambron, American Association of Publishers
Gary Becker, Seminole Co. Public Schools, Florida
Daniel T. Brooks, Cadwalader, Wickersham & Taft
LeRoy Finkel, International Council for Computers in Education
Virginia Helm, Western Illinois University
Kent Kehrberg, Minnesota Educational Computing Corporation
Dan Kunz, Commodore Business Machines
Bodie Marx, Mindscape, Inc.
Kenton Pattie, International Communications Industries Association
Carol Risher, American Association of Publishers
Linda Roberts, US Congress—OTA
Donald A. Ross, Microcomputer Workshops Courseware
Larry Smith, Wayne County Int. Schl. Dist., Michigan
Ken Wasch, Software Publishers Association

For more information write to the ICCE Software Copyright Committee, ICCE, University of Oregon, 1787 Agate St., Eugene, OR 97403.

Guidelines for Off-Air Recording of Broadcast Programing for Educational Purposes

In accordance with what we believe was (the) intent, the Negotiating Committee has limited its discussion to nonprofit educational institutions and to television programs broadcast for reception by the general public without charge. Within the guidelines, the Negotiating Committee does not intend that off-air recordings by teachers under fair use be permitted to be intentionally substituted in the school curriculum for a standard practice of purchase or license of the same educational material by the institution concerned.

1. The guidelines were developed to apply only to off-air recordings by nonprofit educational institutions.
2. A broadcast program may be recorded off-air simultaneously with broadcast transmission (including simultaneous cable retransmission) and retained by a nonprofit educational institution for a period not to exceed the first forty five (45) consecutive calendar days after date of recording. Upon conclusion of such retention period, all off-air recordings must be erased or destroyed immediately. "Broadcast programs" are television programs transmitted by television stations for reception by the general public without charge.
3. Off-air recordings may be used once by individual teachers in the course of relevant teaching activities, and repeated once only when instructional reinforcement is necessary, in classrooms and similar places devoted to instruction within a single building, cluster or campus, as well as in the homes of students receiving formalized home instruction, during the first ten (10) consecutive school days in the forty-five (45) day calendar day retention period.
4. Off-air recordings may be made only at the request of and used by individual teachers, and may not be regularly recorded in anticipation of requests. No broadcast program may be recorded off-air more than once at the request of the same teacher, regardless of the number of times the program may be broadcast.
5. A limited number of copies may be reproduced from each off-air recording to meet the legitimate needs of teachers under these guidelines. Each such additional copy shall be subject to all provisions governing the original recording.
6. After the first ten (10) consecutive school days, off-air recordings may be used up to the end of the forty-five (45) calendar day retention period only for teacher evaluation purposes, i.e., to determine whether or not to include the broadcast program in the teaching curriculum, and may not be used in the recording institution for student exhibition or any other nonevaluation purpose without authorization.

7. Off-air recordings need not be used in their entirety, but the recorded programs may not be altered from their original content. Off-air recordings may not be physically or electronically combined or merged to constitute teaching anthologies or compilations.
8. All copies of off-air recordings must include the copyright notice on the broadcast program as recorded.
9. Educational institutions are expected to establish appropriate control procedures to maintain the integrity of these guidelines.

Public Law 96-517
(Computer Amendment)
December 12, 1980

Copyright Law Amended Regarding Computer Programs

The following excerpt amending title 17, United States Code, is taken from Public Law 96-517, dated December 12, 1980 (94 Stat. 3028-29).

Sec. 10. (a) Section 101 of title 17 of the United States Code is amended to add at the end thereof the following new language:

"A 'computer program' is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result."

(b) Section 117 of title 17 of the United States Code is amended to read as follows:

"§117. Limitations on exclusive rights: Computer programs

"Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making" of another copy or adaptation of that computer program provided:

"(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or

"(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

"Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner."

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